# IN THE

# UNITED STATES COURT OF APPEALS

## FOR THE NINTH CIRCUIT

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BRYAN ALAPERET and LAURIE ALAPERET,
by KAREN ALAPERET, as Guardian ad Litem,
and KAREN ALAPERET,
*Plaintiffs-Appellants,*

vs.

No. 22082

W. D. PHELPS, d/b/a PHELPS PUMP
AND EQUIPMENT COMPANY,
*Defendant-Appellee.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA

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## REPLY BRIEF FOR PLAINTIFF-APPELLANTS

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# REPLY TO DEFENDANT-APPELLEE'S BRIEF

Appellants apologize to this Court for omitting the record references to the pleadings and facts upon which diversity jurisdiction in this case is predicated. The apposite references, which were inadvertently omitted from the final typed draft before printing, are the Complaint (Record 6) and the Pre-Trial Order (Record 257).

Appellee has presented certain new matter which will be discussed under the headings used by Appellee in his main brief.

## I.

## Statement of the Case

On p. 2 of his brief, Appellee states the following proposition (which, in substance, is reiterated on p. 8 under Point C):

> The billing by Mr. McNair was for an uncompleted job and was not a billing for the full amount intended by the contracting parties.

Appellee cites no reference to the record which supports this proposition.

The record does show (17a, Q41), however, that Appellee admitted payment of $20.00 to Mr. McNair for the repair work. This admission, being uncontradicted and unexplained, gives rise to the presumption that the entire contract price was for that sum.

A case in point is *Benbow v. Edmunds High School,* 67 S.E. 2nd 680, 681 (S.C. 1951) (more fully discussed at 14-16 of Appellants' main brief), which held the employment of the alleged statutory employee to be "casual", saying:

> The record does not disclose the amount of time required to repair this light but the *bill* only amounted to $22.50, *which was paid by the school.*

It is hard to imagine a case more analogous to the present case than is *Benbow.* As Appellee pointedly states (p. 9),

> The *Benbow* case, cited by the appellants, is a case involving the question of whether or not there is compensation liability.

The present case presents the same question. If the defendant were liable under the Nevada Compensation Act for Douglas Alaperet's death, then this present action has no foundation. If the defendant were not liable for compensation payments (to which thesis, the Appellants devote their entire argument), then the present action is one contemplated by N.R.S. 616.560 (cited in Appellants' main brief at 9).

That compensation was paid, albeit erroneously, is irrelevent to the outcome of the present case. N.R.S. 616.560 expressly provides that subrogation rights are given to the Nevada Industrial Commission (the insurer on any Nevada compensation claim) in any third party action where compensation benefits have already been paid out. The legislature of Nevada has clearly provided for just such a case, as the present case, by enacting the above statute.

II.

## Appellee's Point IV (A)

The fifteen cases cited by Appellee (pp. 4-6) are, for the most part, normal applications of "contractor-under" statutes to situations which are factually different from the instant case. *E.g., Best v. J. & B. Drilling Co.*, 152 So. 2d 119 (La. App. 1963) (cited p. 5 of Appellee's brief, extensively discussed pp. 17-29 of Appellants' main brief).

The sole exceptions appear to be the two Federal District Court cases from Pennsylvania, *Kelpfer v. Joyce*, 197 F. Supp. 676 (D. Pa. 1961); *Hayes v. Delaware Valley Steel Fabricators, Inc.*, 201 F. Supp 954 (E.D. Pa. 1962), which appear to hold that a person may be considered a principal contractor (the statutory employer) even where he contracts out an *entire* project to another. The two cases are completely contrary to the rule in Nevada that a person who contracts out an entire project to another cannot be a principal contractor (or a statutory employer), but must be regarded as a person who is merely "having the work done". See *Simon Service v.*

*Mitchell*, 73 Nev. 9 (at 13 & 15), 307 P.2d 110 (1957); see also *Titanium Metals v. District Court*, 76 Nev. 72, 349 P.2d 444 (1960). Both of these Nevada cases are extensively discussed in Appellants' main brief at 23-26.

Appellee is also confused as to the scope of the Nevada statutes defining whether employment is "casual" or "not in the course of the employer's business". He states (p. 7):

> . . . The statutes merely provide a criterion to determine whether or not the employer-employee relationship exists—i.e., *the relationship between Mr. McNair (the welding contractor) and the decedent* (italics added).

If Appellee means to say that N.R.S. 616.060, 616.030, 616.120 speak only to a common law employment relationship, he is in error. These statutes, which are cited in Appellants' main brief at 13, (and those like them) apply to both common law and statutory employment relationships. Appellants have found no instance where their coverage has been limited to common law employment. *See Benbow v. Edmund High School*, 67 S.E.2d 680 (S.C. 1951), and cases cited therein.

III.

## Appellee's Point IV (E)

*Walsh v. McDonald Eng. Co.* No. A 10557 (Nev. Dist. Ct.) (cited Appellee's brief at p. 12), is factually dissimilar to the present case as it involved a third party action between a subcontractor and an employee of another subcontractor on the same project. Under N.R.S. 616.085, subcontractors (as well as their employees) are employees of the principal contractor. Under N.R.S. 616.560, a third party action may not be brought against persons in the "same employ" (i.e., employees of the principal contractor, whether common law or statutory), just as they cannot be brought against the employer.

If anything is clear in the present case, it is that the Appellee-Defendant is neither a subcontractor nor a statutory employee of anyone. His freedom from liability can be predicated only upon the argument that he is the statutory employer of the decedent, Douglas Alaperet. The Argument

in Appellants' main brief (comprising three alternative arguments, pp. 14-22, 22-26, 26-30 respectively) refute any such argument.

It might be noted that in his explanation of the *Walsh* case the Appellee points out (p. 12),

> . . . The defendant was granted a Summary Judgment against the plaintiff on the grounds that . . . the action could not be brought against a person in the *same employ*, . . . .

Hence, the holding in *Walsh* seems to be contrary to Appellee's contention that Nevada has adopted the doctrine of "common employment".*

## IV.

## Appellee's Argument

In *Tab Const. Co. v. District Court*, 432 P. 2d 90 (Nev. 1967), it should be noted that the plaintiff's employer was expressly denominated a subcontractor to the principal contractor who was sued by the subcontractor's employee.

Hence, the *Tab* opinion is no more than a normal, and correct, application of a "same employ", "contractor-under" statute, like Nevada's, to the case where an employee of a subcontractor, *who is expressly held to be just that*, sues the principal contractor in a third party action. *Tab Const. Co.* follows the *Simon Service* and *Titanium Metals* cases, whose rationale has been so extensively discussed in the Appellants' main brief (pp. 22-26) that further discussion would be redundant, save to note that both these cases support Appellants' position in this appeal.

It might be noted that the *Tab* case does not find it necessary to discuss the three questions which are determinative of this appeal:

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* Of course no matter what interpretation one places upon the Walsh case, since it is *nisi prius*, it is not binding precedent upon this court. King v. United Commercial Travelers, 333 U.S. 153 (1948), stated:

> . . . . It would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court.

See also Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967).

(1) Whether the Appellee-Defendant was the principal contractor, or merely a person "having the work done", in regard to the repair project (the *Tab* case apparently did not arise out of a contract to repair an object which the principal contractor could not repair himself)

(2) Whether Harlan McNair was a subcontractor in fact (the plaintiff's employer in *Tab* was expressly found to be a subcontractor and there was no need to interpret N.R.S. 616.115)

(3) Whether the work engaged in was "casual" and "not in the course of" the alleged statutory employer's business (there is no mention in Tab of N.R.S. 616.060, 616.030 and 616.120)

It might also be noted that the term, "common employment", is not mentioned once in the *Tab* opinion. It seems strange that a state would adopt, much less "reaffirm", a rule without mentioning it once in either its statutory or judicial expressions.

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## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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